sary to secure the safety of those engaged in a dangerous business, and only such regulations as are palpably arbitrary can be set aside as violating the due process provision of the fourteenth amendment. "A large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests."[6]

To the objection in Barrett v. State of Indiana that the statute is in violation of the equal protection clause of the fourteenth amendment in that it applies to bituminous coal mines alone, the court answers that "this is not so unreasonable or arbitrary as to justify the courts in overruling the legislature. Courts will not interfere . . . unless it appears that there is no fair reason for the law that would with equal force not require its extension to others whom it leaves untouched."

While to the objection in Plymouth Coal Company v. Commonwealth of Pennsylvania, that the statute provides for taking of property without due process of law because it provides that the width of the pillar is to be determined by the engineers of the adjoining property owners together with the inspector of the district, the court answers that "this method is not so crude, uncertain or unjust as to constitute a taking of property without due process of law". It would, as is apparent, be impracticable for the legislature to fix an arbitrary width for all pillars alike and it was therefore justified in leaving this determination to an administrative board. This is in line with the holding of the above cited case of St. Louis Consolidated Coal Company v. Illinois.[7] Though a case dealing primarily with the inspection of mines, it nevertheless illustrates the point that the legislature may leave the determination of certain details to a body of men to be appointed in a manner provided by the legislature. It held that "in enacting a law with regard to the inspection of mines, we see no objection, in case the legislature finds it impracticable to classify the mines for the purpose of inspection, to commit that power to a body of experts who are not only experienced in the operation of mines, but are acquainted with the details necessary to be known to make a reasonable classification, etc."

W. J. A.

PERSONS: LEGITIMACY: WHAT ARE MARRIAGES NULL IN LAW UNDER SECTION 1387, CALIFORNIA CIVIL CODE.—An apt illustration of the dangers attendant upon codification is the important concluding sentence of section 1387 of the Civil Code: "The issue of all marriages null in law, or dissolved by divorce, are legiti-

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[6] Lawton v. Steele (1894), 152 U. S. 133, 136, 38 L. Ed. 385, 14 Sup. Ct. Rep. 499.

[7] (1902), 185 U. S. 203, 46 L. Ed. 872, 22 Sup. Ct. Rep. 616.

mate." The difficulty lies in ascertaining the meaning of apparently plain language.[1]

Admittedly, there is force in the paradoxical contention that a marriage "null in law" means a voidable marriage—one which in its legal effects is valid until duly annulled by proper proceedings, when it becomes void *ab initio*, as distinguished from a "marriage" absolutely void from the beginning, the form or ceremony of marriage having been enacted without resulting in the status or relation of marriage.[2] Thus it is argued that the sentence in section 1387 is substantially the re-enactment of a provision adopted into the law of this state in 1850, which read: "The issue of all marriages deemed null in law, or dissolved by divorce, shall be legitimate";[3] that marriages "deemed null in law" were then "dissolved by divorce", the latter term signifying the annulment of voidable marriages, as well as the dissolution of valid ones, but not the judicial declaration of void marriages;[4] and that the provision in the act of 1850 (there being no other statute like section 84 of the Civil Code) was intended to save the legitimacy of children of voidable or annulled marriages, who, after the annulment, would otherwise be illegitimate.[5] Moreover, it is pointed out that derivatives of the word "null", "nullity", "annulment", and the like are consistently employed in the Civil Code with reference solely to voidable marriages, and that void marriages are therein designated "void".[6] Stress, also, is laid on the supposed absurdity of treating the word "marriages" in the last clause of section 1387 in any sense other than status. But these considerations have not prevailed. In *Estate of Shipp*[7] the sole question was a child's right to inherit as his father's legitimate heir. A marriage between the father and the child's mother had been solemnized by an authorized person in 1909, the parties being capable of entering matrimonial contract, and the solemnization regular in every way except for want of a license. The woman believed that a license had been duly issued, and assumed marital relations in good faith, thinking she was a wife. The child was born of this union in 1911. Granting, without

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[1] Perhaps there is no better discussion of the construction of this provision than in the briefs and arguments of counsel in Estate of Baldwin (1912), 162 Cal. 471, 123 Pac. 267.

[2] As to voidable and void marriages, see Linebaugh v. Linebaugh (1902), 137 Cal. 26, 69 Pac. 616; Estate of Gregorson (1911), 160 Cal. 21, 116 Pac. 60; Coats v. Coats (1911), 160 Cal. 671, 118 Pac. 441.

[3] Act "to regulate Descents and Distributions", 1850 Stats. Cal. 219, Comp. Laws Cal. 1850-1853, ch. 42, p. 186.

[4] See act "concerning Divorces", 1851 Stats. Cal., 186, Comp. Laws Cal. 1850-1853, ch. 116, p. 371; 2 Bishop, Marriage, Divorce and Separation, § 473. Also Dunphy v. Dunphy (1911), 161 Cal. 87, 118 Pac. 445.

[5] Coats v. Coats (1911), 160 Cal. 671, at pp. 675, 676; Bl. Com., Cooley's ed., bk. i, ch. 16, pp. 457, 458.

[6] Compare Cal. Civ. Code, §§ 82-86 with §§ 59, 60, 61 and 80.

[7] (Oct. 15, 1914), 48 Cal. Dec. 444.

deciding, that lack of a license invalidated the marriage, the Supreme Court held the child legitimate and entitled to inherit as the issue of a marriage null in law, and distinctly rejected, as too narrow, that construction of the phrase which would include only voidable marriages, those subject to annulment on grounds exclusively specified in section 82 of the Civil Code. "The section", said the court, referring to section 1387, "should be liberally construed[8] and held to apply to an attempted marriage, contracted in good faith, so far, at least, as one of the parties is concerned, where there is a concurrence of the elements of marriage, as defined in section 55 of the Civil Code; that is to say, where there has been the consent of parties capable of making a contract of marriage followed by a solemnization authorized by the code."

While the decision leaves open to question whether the enactment legitimates offspring of marriages illegal and void because incestuous[9] or miscegenetic,[10] it is to be noted that the statute confers legitimacy on "the issue of all marriages null in law". Having now construed "marriages null in law" to mean void marriages are any such without the scope of the provision? With respect to marriages between persons one of whom is already married, which are illegal and void under certain circumstances,[11] it is clear, that, if the court's construction be the correct one, the case disposes of a proposition advanced, but not passed upon, in Estate of Baldwin,[12] that such a marriage cannot be a marriage "null in law", and the issue, therefore, legitimate, because the married party being incapable of consenting to another marriage, the ceremony or form of marriage created no matrimonial status or relation. The court's view in the principal case repudiates a legislative intent to use the word "marriages" in this connection, in the restricted sense of status. But as far as judicial determination in this state goes, Graham v. Bennett,[13] decided under the Act of 1850 and fortified by the Supreme Court's latest ruling, would seem to be controlling to the effect that the issue of a void bigamous marriage may be legitimate by virtue of section 1387.[14] In other jurisdictions similar statutes have been so interpreted, even long before the legislature of 1850 came into session.[15] Indeed, bearing in mind

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[8] Citing Blythe v. Ayres (1892), 96 Cal. 532, 582, 31 Pac. 915, 924, 19 L. R. A. 40.

[9] Cal. Civ. Code, § 59; Cal. Pen. Code, § 285.

[10] Cal. Civ. Code, § 60.

[11] Id., § 61.

[12] Supra, note 1.

[13] (1852), 2 Cal. 503.

[14] Obiter dicta to contrary in Estate of Wood (1902), 137 Cal. 129, 131, 132, 69 Pac. 900, 901; Estate of Harrington (1903), 140 Cal. 244, 248, 73 Pac. 1000, 1001, 98 Am. St. Rep. 51.

[15] Sneed v. Ewing (1831), 28 Ky. 460, 22 Am. Dec. 41; Workman v. Harold (Ky., 1887), 2 S. W. 679; Buchanan v. Harvey (1864), 35 Mo. 276; Green v. Green (1894), 126 Mo. 17, 28 S. W. 752; Wright v. Lore

the general kindly attitude of our law towards illegitimates, and looking at the unfortunate plight of the children, is it unreasonable that they should have been intended to share the benefits of legitimacy provided by the above section, where, at any rate, either, or both, of their parents entered matrimony in good faith and ignorant of existing impediments to valid and lawful marriage?[16]

T. A. J. D.

PLEADING: PROMISSORY NOTES: ALLEGATION OF NON-PAYMENT.—It is a well settled rule in California, that, in actions upon money demands, including actions upon promissory notes, the complaint must aver non-payment as a breach in a distinct form, or it will fail to state a cause of action.[1] It is useless at this late day to discuss the merits of this rule, as it is firmly established.[2]

Although it is a rule easily complied with, there has been considerable litigation to determine just what is a sufficient allegation of non-payment. It was early pointed out that a mere statement that a certain sum is due and owing will not stand the test of a demurrer,[3] but that such an allegation is sufficient in the absence of a demurrer and after judgment.[4] It is conceded that such an averment is a statement of a conclusion of law, rather than of an ultimate fact, but such faults are cured by judgment.[5] It has been held to be a reversible error, however, to overrule a general demurrer to such a complaint.[6] Although the objection that a complaint does not state facts sufficient to constitute a cause of action is not waived by a failure to demur,[7] apparently the interposition of a general demurrer will have the effect of saving a point for appeal which would otherwise become unavailable after judg-

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(1861), 12 Ohio St. 619; Stones v. Keeling (1804), 5 Call (Va.) 143; Heckert v. Hile's Adm'r (1894), 90 Va. 390, 18 S. E. 841; Watts v. Owens (1885), 62 Wis. 512, 22 N. W. 720. These cases, especially Buchanan v. Harvey, show the length to which courts have gone in favor of legitimacy. But where there was not even an attempt to marry in legal form the issue has been held not to be legitimated by the statute. Walker's Estate (1896), 5 Ariz. 70, 46 Pac. 67; Keen v. Keen (1904), 184 Mo. 358, 83 S. W. 526.

[16] There is analogy in the putative marriage of Spanish law. See Gaines v. Hennen (1860), 24 How. 553, 16 L. Ed. 770; Gaines v. New Orleans (1867), 6 Wall. 642, 18 L. Ed. 950; Lee v. Smith (1856), 18 Tex. 142.

[1] Dodge v. Kimple (1898), 121 Cal. 580, 54 Pac. 94; Bank of Shasta v. Boyd (1893), 99 Cal. 604, 34 Pac. 337; Pomeroy's Code Remedies, 4th ed., § 576; Hudelson v. First Nat. Bank (1897), 51 Neb. 557, 71 N. W. 304.

[2] Richards v. Lake View Land Co. (1897), 115 Cal. 642, 47 Pac. 683.

[3] Frisch v. Caler (1862), 21 Cal. 71.

[4] Stewart v. Burbridge (1909), 10 Cal. App. 623, 102 Pac. 962.

[5] Penrose v. Winter (1901), 135 Cal. 289, 67 Pac. 772.

[6] Knox v. Buckman Contracting Co. (1903), 139 Cal. 598, 73 Pac. 428.

[7] Cal. Code Civ. Proc., § 434.